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No. 99-624

In The

# Supreme Court of the United States

GERARD A. CORSINI,

*Petitioner,*

- against -

U-HAUL INTERNATIONAL, INC., *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Appellate Division, New York Supreme Court, First Judicial Department**

## REPLY BRIEF IN SUPPORT OF PETITION

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## REPLY BRIEF IN SUPPORT OF PETITION

Petitioner respectfully submits this reply brief in support of his petition for a writ of certiorari.

## I.

## THE STATE COURT'S VIOLATIONS OF PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHT TO A HEARING ON THE MERITS OF HIS CLAIMS ARE INDISPUTABLE

Respondent Jackson conspicuously fails to address *Societe International v. Rogers*, 357 U.S. 197, 209 (1958), *Hovey v. Elliott*, 167 U.S. 409 (1897) or the related cases cited in the Petition and instead misplaces reliance on *Chambers v. Nasco*, 501 U.S. 32 (1991) and *Link v. Wabash R. Co.*, 370 U.S. 626 (1992), for the general proposition that a court has inherent authority to dismiss "for abuses of the judicial process" and on *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) for the general proposition that a court has authority under Federal Rule 37(b) to dismiss a party's claims for discovery abuses.[1]

Here, the dismissals in question were expressly made for "discovery abuse . . . in the form of extreme incivility by an attorney with respect to an adversary" pursuant to CPLR Section 3126, Federal Rule 37's state counterpart,

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[1] The U-Haul respondents' untenable position that petitioner had in fact been afforded a hearing on the merits speaks for itself. Respondent Amerco, Inc. filed no opposition brief.

not upon any purported inherent authority of the court.[2] More important, in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 349-351 (1909), this Court, pointing out that the lower court in *Hovey v. Elliott* had unconstitutionally stricken defendant's answer pursuant to "what it assumed to be its inherent authority", made clear that the constitutional infirmities did not depend upon the source of the power, whether inherent or rule based, but upon the constitutional safeguards themselves, which the Court described as follows:

> "The fundamental guaranty of due process is absolute, and not merely relative. The inherent want of power of a court to do what was done in Hovey v. Elliott was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable . . . Hovey v. Elliott involved a denial of all right to defend as a mere punishment . . . [whereas the] proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the

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[2] Petition, 24a.

power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other." At 349-351.

This Court further explained in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 707-708 (1982), that

"Rule 37(b)(2) contains two standards – one general and one specific – that limit a district court's discretion. First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing, supra*, the former represents the general due process restrictions on the court's discretion.

In holding that the sanction in this case was 'just', we rely specifically on the following. First, the initial discovery request was made in July, 1977. Despite repeated orders from the court to provide the requested material, on December 21, 1978, the District Court was able to state that the petitioners 'haven't even made any effort to get this information up to this point.' . . . The Court then warned petitioners of a possible sanction.

> Confronted with continued delay and an obvious disregard of its orders, the trial court's invoking of its powers under Rule 37 was clearly appropriate. Second, petitioners repeatedly agreed to comply with the discovery orders within specified time periods. In each instance, petitioners failed to comply with their agreements . . . Fourth, petitioners had ample warning that a continued failure to comply with the discovery orders would lead to the imposition of this sanction. Furthermore, the proposed sanction made it clear that, even if there was not compliance with the discovery order, this sanction would not be applied if petitioners were to 'produce statistics' . . . Petitioners failed to comply with the discovery order; they also failed to attempt to meet this burden of proof. This behavior coupled with the ample warnings, demonstrates the "justice" of the trial court's order."

The facts of this case stand in stark contrast. Here, unlike *Insurance Corp. v. Compagnie Des Bauxites, National Hockey League v. Metropolitan Hockey Club, Inc.* and *Roadway Express, Inc. v. Piper, supra,* there was no violation of any court order, much less a discovery order; no warning of the imposition of any sanctions, much less the imposition of the drastic sanction of dismissal for rudeness having nothing whatever to do with "proof concern[ing] the rightful decision of the cause" (*Hammond Packing Co., supra* at 351), including rudeness completely outside any proceeding in the dismissed actions; and no "specific" relationship between the sanction imposed and petitioner's claims, particularly as there had been no prejudice to respondents' ability to defend and petitioner had

fully answered all deposition questions before a hearing officer long before the first dismissal order.[3]

Thus, the dismissal orders at bar clearly failed to satisfy the dual due process restrictions enunciated by the Court in *Insurance Corp. v. Compagnie Des Bauxites, supra,* that the orders be both "just" and "specifically" tailored to a claim at issue in a discovery order. The dismissal orders were therefore even more egregiously violative of petitioner's "essential" due process rights than the unconstitutional order in *Hovey v. Elliott* striking a party's defenses for failure to comply with a court order to pay monies into court.

In *Degen v. United States,* 517 U.S. 820, 827-829 (1996), the Court, although not basing its decision on constitutional grounds, referenced its holding in *Hovey v. Elliott* that disentitlement was unconstitutional as mere punishment for contempt of court, in reversing the striking of a party's civil claims based upon his failure to appear in a related criminal prosecution, stating that a "court's inherent power is limited by the necessity giving rise to its exercise" and that

> " . . . the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is involved. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of the merits." At 827-829.

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[3] Petition, p. 5.

Here, of course, there was absolutely no interest of the state court in upholding the dignity of any judgments or orders and no such interest was asserted, as no orders of any kind, much less discovery orders, were at issue.

Moreover, even if this case did not, as it clearly does, fall squarely within the constitutional prohibitions of *Hovey v. Elliott* and *Hammond Packing Co., supra,* regardless of the purported authority for the dismissals in question, *Chambers v. Nasco* and *Link v. Wabash R. Co., supra,* could provide no support to respondents.

*Link* merely acknowledged the long-standing inherent authority of a court to dismiss *sua sponte* for a lack of prosecution (circumstances which clearly give rise to a permissible presumption of a cause's lack of merit), holding that Federal Rule 41, which authorized the same relief on the motion of a party, did not preclude the exercise of that inherent authority.

*Chambers v. Nasco, supra,* did not involve the dismissal of an action depriving the sanctioned party of a hearing on the merits of his claims or defenses, as here and in *Hovey v. Elliott,* but rather the question whether the court had inherent authority to award attorneys' fees as a sanction against a party "whose entire course of conduct throughout the lawsuit evidenced bad faith and an attempt to perpetrate a fraud on the court" after numerous warnings from the court. 501 U.S. at 37-38 and 50-51. Similarly, *Roadway Express, Inc. v. Piper, supra,* involved the willful violation of a discovery order and numerous failures to provide discovery and attend hearings justifying the district court's inherent authority to assess attorneys' fees, the Court expressly noting that

"[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers". 447 U.S. at footnote 14.

## II.

## RESPONDENTS DO NOT DISPUTE THE EXTRAORDINARY AND PERVASIVE BIAS OF THE FIRST DEPARTMENT IN ALL THREE APPEALS OR THE VIOLATIONS OF PETITIONER'S FIRST AMENDMENT RIGHTS

The U-Haul respondents do not dispute any of the extraordinary bias of Justices Ross, Rosenberger or the First Department in all three appeals set forth in the Petition[4] and record or the fact that it flagrantly violated petitioner's procedural due process right to fair and impartial tribunals. Respondent Jackson likewise fails to dispute that bias or its unconstitutionality but seeks to "wish it away" by disingenuously suggesting that it is outside a record replete with undisputed evidence thereof. *See, e.g.*, Petition, 5a; 27a-30a (with references to the record below); 34a, 37a-38a and 40a.

Similarly, the U-Haul respondents do not dispute that the record establishes as a matter of law that their counsel had fabricated an accusation that petitioner had made an ethnic slur against him[5] or that their counsel's outrageous accusation that petitioner had "stalked" him in a public courthouse involved nothing more than petitioner's attendance at a public trial to listen, observe and obtain

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[4] Petition, pp. 5-20.

[5] Petition, p. 4.

information.[6] Instead, the U-Haul respondents merely repeat the disproved accusations with reference to the lower court record to mask their inability to dispute the record.[7]

Nor do respondents address the serious misconduct of their counsel established as a matter of law in the record[8] which was the subject of all of petitioner's deposition statements in issue or the state court's extraordinarily biased and distorted opinion whose findings were unsupported as a matter of law.[9]

Instead, taking petitioner's deposition statements completely out of the context of their counsel's misconduct and intentional provocations established in the record as a matter of law,[10] the U-Haul respondents seek to make petitioner so unlikeable that this Court, like the state court, will surrender the fundamental constitutional guarantees established by its unequivocal precedents and

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[6] Petition, pp. 7-9.

[7] Respondents also repeat their counsel's false non-evidentiary accusation made at petitioner's deposition that petitioner "began 'screaming at the top of his lungs' " even though it had been established by undisputed evidence in the record to have been false. *See* Petition, footnote 6.

[8] Petition, pp. 9-10, in particular footnote 6.

[9] *See, e.g.*, Petition, pp. 7-12. Not only is respondents' assertion that petitioner's "answers were designed to thwart discovery and impair the entire litigation process" unsupported by the record, it was established in the record that petitioner had answered virtually every relevant question concerning the matters the subject of the complaint and answers at his initial deposition.

[10] Petition, pp. 9-10, in particular footnote 6.

mandated by the most basic notions of fairness and due process. The very notion that a plaintiff with established claims for having been assaulted with a shotgun by respondents could have his claims dismissed for rudeness to respondents' counsel involving his objections to established misconduct of counsel and his attendance at a public trial unrelated to his claims without the violation of any court order, any prejudice to respondents or any presumption concerning the merits of his claims is shocking enough. That the First Department would express repugnant ethnic bias in open court in favor of respondents' counsel and then base its decision on rudeness to him, later reverse Justice Kupferman's recusal order and dismiss a second action notwithstanding the constitutional precedents of this Court and conflicting controlling state and decisional law precluding same, thereafter prejudice petitioner's disciplinary proceeding commenced by the court but later refuse to follow the *sua sponte* recusal order entered in connection therewith and then further rule against petitioner in amending the dismissal judgment to include a non-appealing party contrary to both controlling law and the express language of the controlling opinion after expressing further bias is so prejudicial to the administration of justice and so disrespectful of this Court as to defy description.

Respectfully submitted,

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